

COURT OF APPEALS
DELAWARE COUNTY, OHIO
FIFTH APPELLATE DISTRICT

DELAWARE COUNTY BANK AND
TRUST COMPANY

Plaintiff-Appellee

JUDGES:

Hon. Sheila G. Farmer, P.J.

Hon. John W. Wise, J.

Hon. Patricia A. Delaney, J.

-vs-

AHI LAND DEVELOPMENT GROUP,
INC., ET AL.

Defendants

Case No. 09CAE120105

and

TRUCCO CONSTRUCTION COMPANY

Defendant-Appellant

OPINION

CHARACTER OF PROCEEDING:

Appeal from the Court of Common Pleas,
Case No. 08CVE040585

JUDGMENT:

Affirmed

DATE OF JUDGMENT ENTRY:

August 17, 2010

APPEARANCES:

For Plaintiff-Appellee

For Defendant-Appellant

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Farmer, P.J.

{¶1} In 2004, AHI Land Development Group, Inc. and appellant, Trucco Construction Company, entered into an agreement whereby appellant agreed to provide site development services, labor, and materials for the construction of Phase I of a project known as the Meadows of Mill Creek located in the Village of Ostrander. On October 21, 2004, appellant filed a notice of commencement for the project with the Delaware County Recorder's Office.

{¶2} On September 15, 2005, AHI and appellant entered into a Time and Material contract to provide specific work required by the Village of Ostrander.

{¶3} On December 20, 2005, AHI and appellant entered into a third contract to provide services to AHI for Phase II of the project.

{¶4} Appellee, Delaware County Bank and Trust Company, made at least two loans to AHI to finance the project, one recorded on October 21, 2004 and the second recorded on December 15, 2005. Thereafter, AHI failed to pay appellant for work and material provided on the project. Appellant filed a mechanic's lien on April 16, 2007.

{¶5} On May 8, 2008, appellee filed an amended foreclosure complaint against AHI and several defendants, including appellant herein, to foreclose claims, liens, or interests the defendants and appellant might have in the subject real estate.

{¶6} By agreed entry filed September 18, 2008, the trial court granted the complaint in foreclosure. The subject property was sold via Sheriff's sale on November 19, 2008. By judgment entry filed December 23, 2008, the trial court confirmed the sale and ordered distribution of the proceeds.

{¶7} A hearing before a magistrate on the priority for distribution of the proceeds was held on March 20, 2009. By decision filed September 30, 2009, the magistrate found appellant's mechanic's lien was valid and had priority over appellee's second mortgage as said mortgage was not a construction mortgage, but awarded appellee priority under the doctrine of equitable subrogation.

{¶8} All parties filed objections to the magistrate's decision. By judgment entry filed November 24, 2009, the trial court overruled appellant's objection and sustained one of appellee's objections, finding appellant failed to establish that the first day work or labor was performed on the project was December 14, 2005; therefore, appellee's mortgage lien was senior to appellant's mechanic's lien. The trial court approved and adopted the magistrate's decision on equitable subrogation.

{¶9} Appellant filed an appeal and this matter is now before this court for consideration. Assignments of error are as follows:

I

{¶10} "THE COURT ERRED IN ITS NOVEMBER 24, 2009 JUDGMENT ENTRY SUSTAINING PLAINTIFF/APPELLEE'S OBJECTION NO. 1 TO THE MAGISTRATE'S DECISION."

II

{¶11} "THE COURT ERRED IN OVERRULING THE DEFENDANT/APPELLANT'S SOLE OBJECTION TO THE MAGISTRATE'S DECISION ON THE ISSUE OF EQUITABLE SUBROGATION."

I

{¶12} Appellant claims the trial court erred in sustaining appellee's objection No. 1 to the magistrate's decision. We disagree.

{¶13} Specifically, appellant argues its "mechanic's lien is effective as of October 21, 2004, the date that the notice of commencement for the entire Project was filed for record in the Delaware County, Ohio, Recorder's Office," not the first date of work on Phase II of the project as listed in the mechanic's lien, December 14, 2005. Appellant's Brief at 9. Furthermore, appellant argues even if the notice of commencement was not recorded, its lien would have an effective date of September 15, 2005, the actual first date of work on Phase II. *Id.* at 10.

{¶14} R.C. 1311.13 governs attaching of liens, continuance and priority. Subsections (A)(1) and (2) state the following:

{¶15} "(1) All liens under sections 1311.01 to 1311.22 of the Revised Code for labor or work performed or materials furnished to the same improvement prior to the recording of the notice of commencement pursuant to section 1311.04 of the Revised Code are effective from the date the first visible work or labor is performed or the first materials are furnished by the first original contractor, subcontractor, material supplier, or laborer to work, labor on, or provide materials to the improvement.

{¶16} "(2) Except as provided in division (A)(3) of this section, liens under sections 1311.01 to 1311.22 of the Revised Code for labor or work performed or materials furnished after the recording of a notice of commencement pursuant to section 1311.04 of the Revised Code are effective from the date of the recording of the notice of commencement."

{¶17} In its judgment entry filed November 24, 2009, the trial court found the following:

{¶18} "In the case sub judice, Defendant Trucco presented evidence that its employee, Virgil Schofield, performed visible Phase II survey work on December 14 and 15, 2005. Defendant Trucco argues that it is undisputed that Trucco completed work on Phase II prior to December 13, 2005. However, Defendant Trucco lists December 14, 2005 as the first day labor or work was performed or material was furnished in its Affidavit for Mechanics' Lien. (Ex. R.) Applying the holding of the *Schalmo* case, Mr. Schofield's survey work, even if visible, is not considered a component-part of the structure. Therefore, the survey work completed by Mr. Schofield is not sufficient to establish Defendant Trucco's mechanic's lien under R.C. 1311.13. A review of the record shows that Defendant Trucco did not present any evidence of additional work being completed on December 14, 2005 that was of the nature to be considered a component-part of the structure. The Court finds that Defendant Trucco has failed to establish that the first day labor or work was performed or material was furnished on the project was December 14, 2005. Therefore, the Court finds that Defendant Trucco has failed to establish the validity of its mechanic's lien.

{¶19} "The Court hereby SUSTAINS the Plaintiff's first objection to the Magistrate's Decision. Accordingly, the Court finds that the Plaintiff's mortgage lien is senior to the mechanic's lien held by Defendant Trucco."

{¶20} The threshold issue is whether the notice of commencement for Phase I can qualify as a notice of commencement for Phase II. There is no dispute that the project was segregated into Phase I and Phase II. There was separate financing for

each phase. T. at 12, 17. Two separate contracts existed between AHI and appellant as to Phases I and II. T. at 53, 55; See, Exhibit A, Contract signed on December 20, 2005 for Phase II. A third contract existed, a time and material contract executed on September 15, 2005, for appellant to perform services for AHI "specifically pertaining to access to the lift station across the stream with the con span and the earthwork associated with that." T. at 61-62.

{¶21} Daily reports involving time spent on the jobsite, Exhibit X, delineated the differences for Phase I and Phase II. T. at 70-73. Randall Rice, appellant's project manager, testified about the work performed for Phase I, and explained work on Phase II occurred while work was on-going on Phase I. T. at 74. Mr. Rice testified appellant began working on Phase II in September of 2005 per the September 15, 2005 contract, and performed surveying work on December 14, 2005. T. at 74, 77. The September work was not a part of Phase I, but had to be done in order to get approval for Phase I per the Village of Ostrander. T. at 64. The September work orders that were approved were associated with Phase II. T. at 65-66. Appellant's own documents establish the September work was for Phase II. T. at 74-75.

{¶22} A "commencement of work" notification was not filed by appellant for Phase II. A surveyor working for appellant, Virgil Schofield, performed eight hours of work on December 14, 2005 and three and one-half hours on December 15, 2005. T. at 78-81. Mr. Schofield was the only employee on the jobsite, and he was operating one of appellant's pick-up trucks. T. at 80.

{¶23} From our review of the evidence, there are two legal conclusions. First, there were two separate contracts for Phase I and Phase II, and a third contract for the

September work. The original notice of commencement only pertained to Phase I. All the evidence presented points to the legal conclusion that the work performed on December 14, 2005 was Phase II work despite the fact that the Phase II contract was not signed until December 20, 2005. Therefore R.C. 1311.13(A) applied.

{¶24} The next issue is whether the work performed on December 14, 2005 met the "first visible work or labor" standard:

{¶25} "In *Rider v. Crobaugh* (1919), 100 Ohio St. 88, 125 N.E. 130, paragraph four of the syllabus, the Supreme Court of Ohio held:

{¶26} " 'If it is *reasonably apparent* to the mortgagee that the construction, excavation or improvement *had not actually and obviously commenced* when the mortgage was filed for record, then such mortgage would retain priority.' (Emphasis added.)

{¶27} "Although the *Rider* court never articulated what constitutes 'commencement of construction,' as that concept appears in R.C. 1311.13, intermediate courts have developed a component-part test. See, e.g., *Huntington Natl. Bank of Columbus v. Treasurer* (1983), 13 Ohio App.3d 408, 13 OBR 493, 469 N.E.2d 535. The component-part test has been structured to require 'the work***deemed the commencement of construction***[to] form a part of the work necessary for the construction *and [to] be of a nature that can afterward be considered a component part of the structure.*' (Emphasis added.) *Id.* at 409, 13 OBR at 495, 469 N.E.2d at 537, citing *North Shaker Blvd. Co. v. Harriman Natl. Bank* (1924), 22 Ohio App. 487, 153 N.E. 909. The purpose of the component-part test is to ensure adequate notice of potentially conflicting liens to those considering business dealings with the landowner.

See *id.* We believe that the component-part test is consistent with the standard announced in *Rider*, and significantly furthers the legislature's goals in drafting R.C. 1311.13.

{¶28} ****

{¶29} "Neither the act of staking out the improvements, nor the soil testing constituted an act that could be considered a component-part of the structure." *Schalmo Builders v. Malz*, (1993), 90 Ohio App.3d 321, 324.

{¶30} The evidence as to the activity on December 14, 2005 was that Mr. Schofield was on the jobsite alone for a total of eleven and one-half hours over a two day period. The only piece of appellant's equipment on site was a pick-up truck bearing the company's logo.

{¶31} We find this activity fits squarely within the parameters of *Schalmo Builders* and concur with our brethren from the Eighth District that it does not meet any test for being a "component-part" of the construction project.

{¶32} Upon review, we find the trial court did not err in determining the December 14, 2005 date did not meet the *Rider* standard. Pursuant to *Rider*, we find the "open-ended" construction loan of appellee filed on December 15, 2005 had priority over appellant's mechanic's lien.

{¶33} Assignment of Error I is denied.

II

{¶34} This assignment of error challenges the trial court's determination of equitable subrogation. Based upon our ruling in Assignment of Error I, we find this issue to be moot.

{¶35} The judgment of the Court of Common Pleas of Delaware County, Ohio is hereby affirmed.

By Farmer, P.J.

Wise, J. and

Delaney, J. dissents.

s/ Sheila G. Farmer_____

s/ John W. Wise_____

JUDGES

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Delaney, J., dissenting

{¶36} I respectfully dissent from the majority opinion.

{¶37} I agree with Appellant's contention that the mechanic's lien is effective as of October 21, 2004, the date that the notice of commencement for the entire Project was filed by AHI Land Development Group (the owner) with the Delaware County Recorder (Exhibit Y). The majority's statement at ¶23 that the original notice of commencement only pertained to Phase I is incorrect and contrary to the Magistrate's finding (which was not objected to by either party) that the "notice of commencement is not limited by its language to a particular phase of the project". Magistrate's Decision, at 4. The fact that the parties distinguish between Phase I and Phase I of the project is irrelevant to determining lien effectiveness under R.C. 1311.13. Indeed, a notice of commencement filed under R.C. 1311.04 only requires the owner to identify the date the owner first executed a contract with an original contractor for the improvement. R.C. 1311.04(B)(7). There appears to be no statutory or contractual requirement, and the parties point to none, that an owner is required to file a subsequent notice of commencement for each additional phase of an improvement.

{¶38} I find meritless Appellee's contention that Appellant waived the argument concerning the notice of commencement because Appellant "failed to raise this issue in its objection to the Magistrate's Decision". Appellee's Brief, at 1. As stated, the Magistrate made the factual finding that the notice of commencement is not limited by its language to a particular phase of the project. In addition, Appellant maintained at hearing that the notice of commencement filed October 21, 2004, covered the entire

project and the effective date of its lien related to that date. See, Trucco's Proposed Findings of Fact, ¶ 5, and Proposed Conclusion of Law, ¶¶3 and 3A.

{¶39} For these reasons, I would sustain Assignment of Error I and would address the Assignment of Error II regarding equitable subrogation.

s / Patricia A. Delaney
JUDGE PATRICIA A. DELANEY

